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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1114, et al.

THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

vs.

SOUTHLAND ROYALTY COMPANY, ET AL., *Respondents*

On a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF LOUISIANA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a lessee under a fifty-year lease can, by selling gas which it produces from the leasehold property in interstate commerce, commit for sale gas which it does not own—the gas remaining in the ground after the lease expires.

STATEMENT

In this case, the Federal Power Commission (Commission) held that the lessee under a fifty-year fixed-term oil and gas lease dedicated for sale property which it did not own—the gas which remained in the

ground at the end of the lease. The Fifth Circuit reversed on the ground that a person may not encumber or agree to sell that which he does not own.

There is no disagreement about the facts in this case. All parties agree that the lessee, Gulf Oil Corporation, does not own the gas which remained in the ground at the end of the fifty-year term of its lease. And all parties agree that the owner of the gas, Southland Royalty Company, has never agreed to sell its gas to El Paso. All parties also agree on two central legal principles: (1) that a person cannot sell that which does not belong to him, and (2) that under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, gas which has been dedicated for sale in interstate commerce may not be withdrawn from sale without first obtaining Commission approval. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959). The only question for decision, then, is whether Gulf ever could have dedicated the gas which all agree it did not own.

Although theFifth Circuit characterized this case as presenting a "property rights vs. regulatory powers issue" (543 F.2d 1134, 1136), there is in fact no conflict between fundamental principles of property ownership and the regulatory powers given to the Commission by the Natural Gas Act. The Act gives the Commission no power to force or to permit a party to dedicate for sale gas which he does not own.

INTEREST OF THE STATE OF LOUISIANA

Approximately 25 percent of the nation's natural gas is produced in Louisiana, and more than 75 percent of the state's production is sold in interstate commerce. Under state law, the Louisiana Department of Natural

Resources and Louisiana's Commissioner of Conservation are charged with the responsibility of enforcing conservation practices, protecting landowners' rights, and encouraging the orderly development of the state's mineral resources. The state itself is a lessor of state-owned lands and water bottoms from which natural gas and oil are produced. Both as a landowner in its own right and as the guardian of the interests of its citizens, the State of Louisiana is concerned about the effect the Commission's position in this case will have on state law and property relationships and upon the exploration for and development of natural gas.

ARGUMENT

I. THE COMMISSION'S POSITION IN THIS CASE THREATENS THE INTEGRITY OF PROPERTY RELATIONSHIPS AND WILL CLOUD THE TITLE TO REAL ESTATE IN LOUISIANA AND ELSEWHERE.

The rationale of the Commission's holding in this case would undermine established patterns of property ownership and would cloud the title to countless acres of gas-producing property in Louisiana.

The Commission's argument reduces to the proposition that a person can commit for sale property which does not belong to him. That proposition, if accepted, is truly revolutionary in its implications. The Commission argues in this case that temporal limitations upon property ownership may be ignored under the Natural Gas Act. By precisely the same reasoning, the Commission could argue in another case that limitations in space should also be ignored. In Louisiana, as in other gas-producing states, it is common for adjacent landowners to share proportionate interests in gas reservoirs which underlie their property. Each surface

owner may lease his proportionate interest in the underlying reservoir. Thus, some gas from a common reservoir may be leased to a producer which is selling its interest in interstate commerce, whereas another portion of the gas from the same reservoir may be leased to a producer which is selling to other purchasers. The Commission's certification policies have always recognized the correlative rights of adjacent landowners. The Commission's theory in this case is that ownership interests may be disregarded once sales in interstate commerce have begun. If Gulf can commit Southland's gas, could it also commit gas which belonged to an adjoining landowner?

In addition to abrogating long established principles of property ownership, the Commission's position, if adopted, would cloud the title to large amounts of land in the gas producing states. In Louisiana, gas sales contracts are rarely recorded. Third party purchasers of land which has been previously subject to a leasehold have no way of knowing whether previous lessees have ever executed contracts to sell gas from their leases in interstate commerce. Under the Commission's theory, even if a lease is terminated for failure of production, if the lessee had previously dedicated production from the lease to interstate commerce, any new reserves discovered by subsequent lessees could also be deemed to have been dedicated. Potential purchasers and lessees would have no practical way to discover such previous dedications. The result would inevitably be to discourage speculative drilling ventures, including those at greater depths where both the risks and the potential for new discoveries may be greater.

The mischief inherent in the Commission's position, then, is great, and its adverse impact could extend be-

yond situations like those presented under the facts of this particular case.

II. THE NATURAL GAS ACT DOES NOT ABROGATE OR SUPERSEDE ESTABLISHED PRINCIPLES OF PROPERTY OWNERSHIP.

There is no real dispute with the conclusion of the Fifth Circuit about the nature of Gulf's property interests:

> Under applicable Texas law, Gulf's rights were those of a tenant for a term of years; its interest was a limited one which terminated completely when title reverted to Southland at the expiration of the 50-year term. It is black letter law that a person holding a present interest in real property which is limited in duration cannot create an estate which will extend beyond the term of his interest . . . Since Gulf never was possessed of rights in the gas under the leasehold lands which could survive the termination of its 50-year lease, it could never create rights in a third person to that same gas . . . The estates in the single tract are as separate as if they subsisted in separate parcels of land. . . . [T]here likewise can be no question that, under well established concepts of property law, Gulf could not legally deal in or dedicate that portion of the gas which Southland might own upon termination of Gulf's estate. 543 F.2d 1134, 1137 (citations omitted).

The only question in this case is whether the Natural Gas Act was intended in some way to abrogate the fundamental ownership principles which have been embodied in the common law for centuries. Such an intention should not be lightly assumed, and, in fact, it is belied by both the language and the purpose of the Natural Gas Act.

As a general proposition, federal law will not be interpreted to supersede state law "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 633 (1973). This Court has said:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. *The exercise of federal supremacy is not lightly to be presumed. Schwartz* v. *Texas*, 344 U.S. 199, 202-203 (1952) (emphasis supplied).

And, in *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 146-47 (1963), the Court stated that federal legislation will not be found to displace state law "in the absence of an unambiguous Congressional mandate to that effect."

In this case, what is challenged is not merely a state regulatory statute. Nor is it, as the Commission would have it, just a "technical concept of local law" (Brief for FPC at 11). What is at stake is nothing less than basic concepts of ownership which date to the earliest traditions of the common law. A Congressional intent to abrogate them certainly cannot be presumed in the absence of a Congressional mandate which is particularly "clear" and unquestionably "unambiguous."

In fact, what is demonstrated by both the language and the legislative history of the Natural Gas Act is a carefully expressed Congressional intent to leave undisturbed state regulatory powers and traditional concepts of ownership. The Natural Gas Act was carefully tailored to supplement rather than to supplant state law. In drawing the Natural Gas Act, the Congress was

"meticulous to take in only territory which [the Supreme Court] had held that the states could not reach," *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507, 519 (1947):

> The Act, although extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement it and reinforce it in the gap created by the prior decisions [of the Supreme Court]. *The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or to dilute it in any way*. 332 U.S. at 517-518 (emphasis supplied).

The Court restated the point in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949):

> . . . [T]he Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. 337 U.S. at 502-503.

And:

> The Natural Gas Act was designed to supplement state power and to produce harmonious and comprehensive regulation of the industry. *Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other*. 337 U.S. at 513 (emphasis supplied).

The language of the Natural Gas Act also shows an express Congressional intent to respect property ownership. Section 7(e) of the Act, 15 U.S.C. § 717f, requires that the applicant for a certificate be "able" to perform the proposed service. "Ability" to perform obviously implies legal power to perform. The same section also establishes that an applicant for a certificate be "willing" to perform services being proposed.

Sunray Mid-Continent Oil Co. v. *FPC*, 364 U.S. 137 (1960), relied upon so heavily by the Commission, merely confirms the point. In *Sunray*, the Court did not hold that an unwilling seller could be required to commence or to continue interstate service. *Sunray* held only that the Commission had the authority to refuse the request of an applicant to limit a certificate in time and, instead, to offer the applicant a certificate of unlimited duration. It could not force the applicant to accept the offered certificate. The applicant in *Sunray* could still have "avail[ed] itself of its undoubted right to stand firm on its own application, and reject the proffered certificate." 364 U.S. at 141. *Sunray* certainly did not establish the principle that a producer may be forced by the Commission to dedicate and sell gas which it does not own or which it is unwilling to commit to sale under the terms laid down by the Commission.

III. THE DECISION OF THE FIFTH CIRCUIT IS NOT CONTRARY TO "ESTABLISHED CONSTRUCTION" OF THE INTERSTATE COMMERCE ACT.

In its brief to this Court, the Commission places heaviest reliance upon the contention that the Fifth Circuit's holding "is contrary to the long settled construction. . . . of the parallel abandonment provisions of the Interstate Commerce Act." (Brief for FPC at

21.) The Commerce Act argument, of course, obscures the fact that the Commission's position is contrary to the "settled construction" of the Natural Gas Act.

Initially, Louisiana strenuously disputes the assumption that these ICC cases are relevant to the Natural Gas Act question presented in this case. The regulation of a producer's sale of natural gas in interstate commerce obviously involves different issues, different questions of public policy, and different patterns of fact and law than does the regulation of railroad service.

However, to the extent that the construction of Section 1(18) of the Interstate Commerce Act is deemed relevant at all to the issue presented in this case, it is simply incorrect to say that judicial construction of the Commerce Act supports the Commission's position. The decisions of this Court which are cited by the Commission, *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946) and *Smith* v. *Hoboken R.R.*, 328 U.S. 123 (1946), certainly do not support the Commission's position.

Thompson differs from the present case in two significant respects. First, the Court in *Thompson* specifically noted that the trackage agreement did not involve any question of property rights, since "the trackage agreement created only a personal obligation and did not purport to grant . . . any estate in the property. . . ." 328 U.S. at 140.

Second, in *Thompson*, the Court specifically noted that both parties were "interstate carriers by railroad and subject to the provisions of the Interstate Commerce Act." 328 U.S. at 136. As such, they were both

subject to the provisions of Section 1(18) which, by its terms, applies only to "carriers by railroad":

> [N]o *carrier by railroad* subject to this chapter shall abandon all or any portion *of* a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Similarly, in *Smith* v. *Hoboken R.R.*, both parties were "carriers by railroad" and subject to the Interstate Commerce Act by its terms. In holding that neither the lessee nor the lessor could terminate the operation of the railroad without abandonment authorization from the ICC, the Court noted that previously the ICC had issued an order dismissing the lessor's application to "resume operations of the railroad" on the grounds that no certificate was needed since the lessor's

> "obligations and duties to the public *have never ceased* but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations, the duties must be performed by the lessor on its own behalf." 328 U.S. at 129 (emphasis supplied).

Thus, in *Smith*, the lessee had been performing a preexisting obligation of the lessor, and when the lessee ceased to perform, the ICC's position was that the lessor's obligation was revived and could not be terminated without the approval of the ICC.

Neither *Thompson* nor *Smith* can be cited for the proposition that a nonjurisdictional entity (a landowner) can be committed by the actions of its lessee to perform jurisdictional services. The point is well explained by the Second Circuit in *Meyers* v. *Famous Realty, Inc.*, 271 F.2d 811 (1959), *cert. denied*, 362 U.S. 910 (1960). In *Meyers*, the lessor of land and tracks previously used by the Jay Street Railroad sought to discontinue railroad operations upon the termination of Jay Street's lease. The court held that the lessor (Famous Realty) was under no obligation to carry on Jay Street's operations "when its lease expires . . ." 271 F.2d at 814. The Commission's attempt to distinguish the *Meyers* case is unavailing. The Commission contends that the principle established in *Meyers* and in the other railroad cases is that railroad operations commenced under lease "may not be terminated unless some party; either the lessor or the lessee, obtains abandonment authorization from the regulatory authority." (Commission Brief at 27-28) The "principle" which the FPC attempts to read into *Meyers* is not the holding in *Meyers* or in any other case cited by the Commission.

In specific reference to the *Thompson* and *Smith* cases, the Second Circuit said:

> [T]hose cases hold, at most, that once a party acquires . . . the status of a "carrier by railroad" . . . it cannot absolutely terminate such status and the duties thereof by leasing its railroad facilities to another; once the lease is terminated or the lessee obtains permission to abandon its operations, the lessor is under *a revived obligation* to operate its railroad properties until it too receives an abandonment order from the Commission. . . . *None of the decisions cited hold or imply that a non-carrier, by merely leasing its properties to a carrier, becomes a "carrier by railroad. . . ."* We hold that a carrier which leases mere trackage rights to another carrier is under no obligation to carry on that other carrier's operations when its lease expires

> or that other carrier's operations are legally abandoned. . . . [A] contrary holding would lead to the absurd conclusion that one renting a patch of cornfield to a railroad would come under an obligation to operate that railroad if it obtained permission to abandon the operation of its line. 271 F.2d 811, 814-815 (emphasis supplied).

By the same reasoning, a landowner such as Southland Royalty does not become a "natural gas company" subject to the provisions of the Natural Gas Act merely by leasing its properties to an entity which is a natural gas company.

IV. THE PUBLIC INTEREST DOES NOT REQUIRE ACCEPTANCE OF THE COMMISSION'S POSITION IN THIS CASE.

Lacking a legal basis for its position, the Commission argues essentially that the public interest will best be served if its extra-legal position prevails. The short answer to the Commission's policy arguments was that given by the D.C. Circuit in *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (1972), *cert. denied*, 406 U.S. 976 (1972):

> . . . . [I]t is not sufficient justification upon which to base an expansion of the Act to activities clearly not within its terms. . . . The FPC is limited by the provision[s] establishing its jurisdiction . . . 463 F.2d at 263.

If the Commission believes that its jurisdiction should be broadened, it should take its request to the Congress.

In addition, the Commission is simply wrong about where the public interest lies. As previously discussed, acceptance of the Commission's position would have severe repercussions on real estate transfers in the gas producing states, would threaten established property relationships among adjacent landowners, cloud legal titles, and discourage natural gas exploration and production. Rejection of the Commission's position on the other hand, as Southland Royalty has shown in its Brief in Opposition to the Petition for Certiorari (at 11-13) would have a result limited in its significance. The public interest would be best served by the affirmance of the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

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